UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 2:13-cv-5828 (JFB)

MICHAEL NAPOLI,

Plaintiff,

- against -

243 GLEN COVE AVENUE GRIMALDI INC. d/b/a Grimaldi's Pizzeria, FRANK CIOLLI, JOSEPH A. CIOLLI, and 1 FRONT STREET GRIMALDI, INC.

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Defendants Frank Ciolli, 243 Glen Cove Avenue Grimaldi Inc. ("Grimaldi's Sea Cliff"), and 1 Front Street Grimaldi Inc. ("1 Front Street") by and through their counsel McCue, Sussmane & Zapfel, P.C., respectfully submit this memorandum of law in support of their joint motion for summary judgment on Plaintiff's claims.

PRELIMINARY STATEMENT

The heart of this dispute between the parties is not over an employer's failure to pay minimum wage or overtime compensation. This dispute is over the ownership and operation of a restaurant in Sea Cliff, New York, known as Grimaldi's Pizzeria (the "Restaurant"). Plaintiff attempts to invoke the jurisdiction of this Court by transforming a business dispute into a minimum wage and overtime action to take advantage of the protections and punitive provisions that the Fair Labor Standards Act (the "FLSA") affords to bona fide employees.

Unsuccessful in operating the Restaurant, Plaintiff now sues to recoup his investment by seeking minimum wage and overtime compensation by attempting to conjure an employer/employee relationship where none exists.

FACTS

1 Front Street Should Not be a Party

1 Front Street operates the famous Grimaldi's Pizzeria at 1 Front Street, Brooklyn, New York. The sole business of such corporation is to operate a pizzeria at the Brooklyn location and it has no relationship to this action. It is not a shareholder of any other company. It has no assets other than the Brooklyn business and does not own any shares of stock or membership interests in any other company. *Ciolli Aff.* ¶*5.* Plaintiff testified that 1 Front Street was not a shareholder of Grimaldi's Sea Cliff. *Ex. C Napoli Dep. 47:9-15.*

Plaintiff does not allege that he performed any services at or for 1 Front Street, or that he had any dealings with 1 Front Street or that 1 Front Street was involved in any other meaningful way with the operation of the Restaurant. Plaintiff's deposition testimony reveals that Plaintiff was in fact at the Restaurant every day. *Ex. C Napoli Dep. 34:10-12*. The only instance involving 1 Front Street that Plaintiff could cite was one instance where Plaintiff traveled to Brooklyn to pick up a mixer from 1 Front Street. *Ex C. Napoli Dep. 48:6-18.*

1 Front Street was formed in 2012 but did not engage in any business activity until 2014, when the operations of the Brooklyn pizzeria were reorganized. As of the date the initial Complaint was filed (October 25, 2013), the company had not earned any gross revenues and had not yet commenced any business in commerce. *Ciolli Aff. ¶6.*

Plaintiff further testified that he knows of no documentation relating 1 Front Street to the Restaurant. *Ex. C Napoli Dep. 47:19-48:5.*

Grimaldi's Sea Cliff

The dispute with Plaintiff arises out of the opening and operation of a Grimaldi's restaurant at 243 Glen Cove Avenue, Sea Cliff, New York in or about January 2013.

Plaintiff approached Mr. Ciolli to open a Grimaldi's pizzeria in Sea Cliff near Plaintiff's home. Plaintiff had previously worked on Wall Street, was not employed, and wanted to get into the restaurant business. *Ciolli Aff. ¶9.*

Plaintiff and Mr. Ciolli agreed to enter into a joint venture to operate a Grimaldi's pizzeria in Sea Cliff. Mr. Ciolli agreed to form a corporation and secure a lease for the Restaurant, construct the Restaurant with Grimaldi's signature coal-fired brick oven, and allow the Restaurant to use the Grimaldi's name and recipes. Plaintiff agreed to operate the business. Plaintiff and Mr. Ciolli agreed that they would split the profits from the business. *Ciolli Aff. ¶10.*

In reliance on the oral joint venture agreement, Mr. Ciolli formed 243 Glen Cove Avenue Grimaldi Inc., a New York corporation ("Grimaldi's Sea Cliff"). Such corporation entered into a lease for the premises known at 243 Glen Cove Avenue, Sea Cliff, New York. *Ciolli Aff. ¶11, Ex. D.*

Plaintiff repeatedly listed himself as the owner, tenant or proprietor of the business on the applications for approvals and permits with the local government authorities. *Ciolli Aff. ¶13*; *Exs. E through J.*

Plaintiff caused Grimaldi's Sea Cliff's lease to be terminated and he signed a new lease with the Landlord dated January 1, 2013, naming himself as the tenant. *Ciolli Aff. ¶20*; *Ex. K.* Plaintiff applied for and obtained a liquor license from the New York State Liquor Authority (the "NYSLA"), stating under oath that he was the sole "principal" and that he was the sole "proprietor." *Ciolli Aff. ¶21*; *Ex. L.* In January 2013, Plaintiff opened the Restaurant for business as a sole proprietorship, based on the permits issued to him by local government, the liquor license issued to him by the NYSLA and the lease secured in his name. *Ciolli Aff. ¶¶22, 23.*

Plaintiff unilaterally completed and opened the Restaurant as a sole proprietor without Mr. Ciolli's knowledge or approval, excluding Mr. Ciolli from the decisions to complete and open the Restaurant and excluding Mr. Ciolli from any control over the operations, financial affairs or books and records of the Restaurant. *Ciolli Aff. ¶26.*

In January 2013, Plaintiff publicized his opening of the Restaurant with several newspaper and internet articles, copies of which are attached hereto as Exhibit M. Plaintiff caused himself to be described as the "owner" or "franchisee" in these articles. He is not described as the manager or as an employee. *Ciolli Aff. ¶24*; *Ex. M.*

Since its opening, Plaintiff has been solely responsible for each and every facet of the operation of the Restaurant. Mr. Ciolli did not have any control over Plaintiff and his operation of the Restaurant. At no point did any defendant in this action, have the ability to hire or fire Plaintiff, or control Plaintiff's schedule or work conditions, determine Plaintiff's rate or method of payment, and/or Plaintiff's decision whether or not to pay himself a draw against profits or a salary. *Ciolli Aff.* ¶*30*; *Ex. A Complaint* ¶*33; Ex. C Napoli Dep. 22:2-7, 33:6-22.*

Plaintiff testified in his deposition that he was the sole authorized signatory on the Restaurant's one bank account, from which all disbursements were made. *Ex. C Napoli Dep. 42:14-43:2*. Plaintiff was at all times in sole custody of the books and records of the Company. *Ex. C Napoli Dep. 42:14-43:2; and Ciolli Aff.* ¶¶*28, 31-34.* Plaintiff hired and trained all employees, set up the operating systems, ordered food and supplies and commenced operations without my involvement or consent. *Ciolli Aff.* ¶*29*; *Ex. C Napoli Dep. 22:2-7 and 33:6-22.*

Plaintiff hired, fired, set the wages and terms of employment, supervised and kept records of the employment of each employee of the Restaurant. *Ciolli Aff.* ¶*31*; *Ex. C Napoli Dep. 33:6-22*.

Mr. Ciolli was never involved in the day-to-day operations of the Restaurant. He visited the restaurant only two or three times to eat dinner and test the quality of the pizza. *Ciolli Aff.* ¶*31*. Plaintiff confirmed that Mr. Ciolli rarely visited the Restaurant, estimating his appearances to be once a month or less. *Ex. C Napoli Dep. 33:23-34:20*.

Plaintiff admitted that, despite being in sole charge of the Restaurant's finances, he decided not to pay himself. *Ex. C Napoli Dep. 56:22-57:8.*

Defendant Ciolli did not maintain or have access to any of the Restaurant's books and records, including any employment records. They were maintained by Plaintiff and he refused to provide access to Mr. Ciolli or his accountant. *Ex. C Napoli Dep. 35:25-36:4 and 38:22-39:11; and Ciolli Aff.* ¶¶*28, 32-34.*

At no point did any Defendant have the ability to hire or fire any employee at the Restaurant, or control any employee's schedule or work conditions, determine any employee's rate or method of payment, or keep records of any employee's employment. *Ciolli Aff.* ¶¶*30, 32.*

Plaintiff claims that defendants "retaliated against Plaintiff Napoli because he filed this lawsuit" by encouraging his employees to quit, and telling customers not to go to the Restaurant. *Ex. A Complaint* ¶¶*76-83.* Plaintiff conceded in his deposition that he has no personal knowledge to support these allegations. *Ex. C Napoli Dep. 50:5-51:15.*

Plaintiff also alleges that defendants retaliated against him by changing the locks to the premises. Such claim must be dismissed because Plaintiff neglects to mention that an eviction proceeding was commenced in April 2014 for failure to pay rent. The papers were served on Plaintiff and he ignored the proceedings. Even though he had complete control of the business, Plaintiff was unable to operate successfully and pay rent and the landlord reclaimed possession of the property. *Ciolli Aff.* ¶*36*; *Ex. C Napoli Dep. 51:25-52:6.*

ARGUMENT

A. Summary Judgment Standard

A summary judgment motion serves to pierce the pleadings and assess the proof to determine whether there is a genuine need for trial. Summary judgment is proper when, after construing the evidence in the light most favorable to the non-moving party, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248

(1986). Furthermore, a fact is "material" in this context where it "might affect the outcome of the suit under the governing law." *Id.*

In addressing potential issues of material fact, the non-moving party "may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that [its] version of the events is not wholly fanciful." *D'Amico v. City of N.Y.*, 132 F.3d 145, 149 (2d Cir. 1998). The "mere existence of a scintilla of evidence" is insufficient to defeat a motion for summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252.

Plaintiff can offer no evidence which demonstrates a genuine dispute as to the material fact that he was an "employee" of any of the Defendants. Accordingly, Defendants respectfully request that the Court grant their motion for summary judgment dismissing Plaintiff's claims.

B. Defendants Are Not Plaintiff's Employers Under the FLSA.

Subject matter jurisdiction in this action is based solely on Plaintiff's claims under the FLSA. The FLSA was passed to end the presence in commerce of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." *29 U.S.C. § 202*. The FLSA "seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation." *Roland Electrical Co. v. Walling*, 326 U.S. 657, 669-670 (1946).

Key to the FLSA are its provisions for minimum wage and overtime compensation for certain bona fide employees. As to minimum wage compensation, the FLSA mandates that:

> "Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce [a minimum wage]." *29 U.S.C. § 206(a)*.

Furthermore, as to overtime compensation, the FLSA requires that:

> "[N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." *29 U.S.C. § 207(a)(1).*

The obligations under these two provisions form the crux of Plaintiff's claims under the FLSA. These provisions, however, are inapplicable to Defendants in relation to Plaintiff, as no Defendant, jointly or singly, was Plaintiff's employer.

1. FLSA Standard and the Economic Reality Test.

By the terms of the statute, "[o]nly an employer may be held liable for FLSA violations." *Coley v. Vannguard Urban Improvement Ass'n*, 2014 U.S. Dist. LEXIS 135608, *7 (E.D.N.Y. Sept. 24, 2014). See also, *29 U.S.C. §§ 206(a), 207(a)(1).* The FLSA defines "employ" to include "to suffer or permit to work," and "employee" to mean "any individual employed by an employer." *29 U.S.C. §§ 203(g), 203(e)(1).* The FLSA then defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee…" and "person" to mean "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." *29 U.S.C. §§ 203(d), 203(a).* Therefore, "[b]ecause the statute [*29 U.S.C. § 203(d)*] defines employer in such broad terms, and its definitional section uses the term it purports to define, the statute offers little guidance on whether a given individual is or is not an employer." *Jean-Louis v. Metro. Cable Communs.*, 838 F. Supp. 2d 111, 120 (S.D.N.Y. 2011) (internal quotation marks and citation omitted).

The Supreme Court has mandated that "the determination of whether an employer-employee relationship exists for purposes of the FLSA should be grounded in 'economic reality rather than technical concepts.'" *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33

(1961). "The determination of the [employment] relationship does not depend on such isolated factors' as where work is done or how compensation is divided 'but rather upon the circumstances of the whole activity.'" *Rutherford Food Corp. v. McComb*, 331 U.S. 772, 730 (1947).

For FLSA purposes, the Second Circuit has treated employment as "a flexible concept to be determined on a case-by-case basis by review of the totality of the circumstances". *Irizarry v. Catsimatidis*, 722 F.3d 99, 104 (2d Cir. 2013) (internal quotation marks and citation omitted). In *Irizarry*, a class of supermarket employees brought suit against their employer, including the chairman and CEO of the supermarket, Catsimatidis, alleging, *inter alia*, the non-payment of overtime compensation under the FLSA.

In addressing the standard for determining the existence of an employer/employee relationship under the FLSA, the Second Circuit "identified different sets of relevant factors [for the economic reality test] based on the factual challenges posed by particular cases." *Irizarry*, 722 F.3d at 104 (internal quotation marks and citation omitted). The court then reiterated its analysis from *Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984), which established four factors to determine the "economic reality" of an employment relationship: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Irizarry*, 722 F.3d at 105. See also, *Godlewska v. HAD*, 916 F. Supp. 2d 246, 257 (E.D.N.Y. 2013).

In applying the *Carter* factors, *Irizarry* ultimately affirmed the grant of summary judgment to the employees on their FLSA claims, finding that Catsimatidis was an "employer" under the statute, due to his substantial involvement in the operations of the supermarket. Unlike the matter presented here, however, Catsimatidis possessed functional control over the enterprise as a whole and additionally was involved in the company's daily operations. Specifically, Catsimatidis contacted individual stores, employees, vendors, and customers, dealt with customer complaints, displays and merchandising, handled the promotion of store personnel, and actively exercised overall financial control of the company. *Irizarry*, 722 F.3d at 116-117.

The instant case is readily distinguishable from *Irizarry* because Mr. Ciolli had little to no involvement in Restaurant operations, he went to the Restaurant only two or three times, and he was totally excluded from operations by Plaintiff.

Regarding the *Carter* factors of the economic reality test, *Irizarry* explained that:

> "none of the factors… comprise a rigid rule for the identification of an FLSA employer. To the contrary… they provide a nonexclusive and overlapping set of factors to ensure that the economic realities test mandated by the Supreme Court is sufficiently comprehensive and flexible to give proper effect to the broad language of the FLSA." *Id.* at 105 (internal quotation marks and citation omitted).

To that end, the "[c]ourt is also free to consider any other factors it deems relevant to its assessment of the economic realities." *Godlewska*, 916 F. Supp. 2d at 257-258 (internal quotation marks and citation omitted).

2. Defendants Are Not Plaintiff's Employers.

In applying the economic reality test to Defendants and in considering the totality of the circumstances, it is clear that at no point were any of the Defendants Plaintiff's employer for purposes of the FLSA. The record is entirely void of the requisite proof necessary to hold Defendants liable as such.

a. 1 Front Street Was Not Plaintiff's Employer

Plaintiff alleges that 1 Front Street is his employer vis-à-vis its purported operation as a parent company to all Grimaldi's Pizzeria locations throughout the United States. *Ex. A*

Complaint ¶*25*. Plaintiff also alleges that, as such, 1 Front Street controls decisions on where to expand as well as operational decisions for each location, including hours of operation and vendors. *Id*. Plaintiff further contends that 1 Front Street jointly owns and operates the Restaurant. *Ex. A Complaint* ¶*28*.

The statement that 1 Front Street jointly employed Plaintiff is a bare legal conclusion which is not supported by a single fact in the record. 1 Front Street operates the famous Grimaldi's Pizzeria in Brooklyn, New York. Its sole business is the operation of the Brooklyn pizzeria; it is not a shareholder of any other company and it has no assets other than the Brooklyn business. 1 Front Street does not otherwise operate as a parent company to any other Grimaldi's Pizzeria location, including the Restaurant. *Ciolli Aff.* ¶5. Plaintiff admits that 1 Front Street is not a shareholder of Grimaldi's Sea Cliff. *Ex. C Napoli Dep. 47:9-18.*

At no time does Plaintiff allege, nor does the record reflect, that Plaintiff performed any services for or at 1 Front Street, or that 1 Front Street was involved in any way with the operation of the Restaurant. Plaintiff's deposition testimony reveals that Plaintiff was in fact at the Restaurant every day. *Ex. C Napoli Dep. 34:10-12*. Plaintiff further testified that he had not observed any documentation relating 1 Front Street to the Restaurant (*Ex. C Napoli Dep. 47:19-48:5*), nor did 1 Front Street provide supplies to the Restaurant (*Ex. C Napoli Dep. 48:6-15*). Plaintiff's only contact with 1 Front Street was to pick up a mixer on one occasion. *Ex. C Napoli Dep. 48:6-18.*

There is no triable issue of fact that 1 Front Street had no authority to hire or fire any employee of the Restaurant, had no control over any employee's schedule or work conditions, and did not determine the rate or method of any employee's compensation. 1 Front Street maintained no records relative to the Restaurant. *Ex. C Napoli Dep. 42:14-43:2; Ciolli Aff.* ¶¶*30,* *32*. Plaintiff cannot raise a triable issue of fact that 1 Front Street was in any way related to the alleged employment of Plaintiff. 1 Front Street was not Plaintiff's employer.

Moreover, 1 Front Street, although formed in 2012, did not engage in any business activity until 2014, when the operations of the Brooklyn pizzeria were reorganized and 1 Front Street commenced operations. As of the date the initial Complaint was filed (October 25, 2013), 1 Front Street had not yet commenced any business activities and had not yet generated any revenues. *Ciolli Aff.* ¶*6*. There is no plausible claim that can be made that 1 Front Street was an "enterprise engaged in commerce" and subject to the provisions of the FLSA. It had not engaged in any commerce and its annual gross volume of sales ($0) was less than the $500,000 threshold proscribed by statute. See *29 U.S.C. § 203(s)(1)(A).*

b. Defendant Grimaldi's Sea Cliff Was Not Plaintiff's Employer

Plaintiff alleges that Grimaldi's Sea Cliff is his employer because Grimaldi's Sea Cliff owned and operated the Restaurant. See *Ex. A Complaint* ¶¶*28-33*.

Although Grimaldi's Sea Cliff was formed to secure the lease for the Restaurant. *Ciolli Aff.* ¶¶*10, 11, Ex D.* It was agreed that Grimaldi's Sea Cliff would construct the Restaurant and allow the Restaurant to use the Grimaldi's Pizzeria name. *Ciolli Aff.* ¶*10.* Plaintiff agreed to operate the Restaurant and split the profits with Grimaldi's Sea Cliff. *Ex. C Napoli Dep 78:17-19.*

Plaintiff unilaterally high jacked the Restaurant and opened as his sole proprietorship, which leaves Plaintiff unable to make a good faith argument that he was an employee Grimaldi's Sea Cliff. From 2011 through 2013, Plaintiff filed numerous application for approvals and variances for the Restaurant with governmental authorities stating that Plaintiff was the "tenant", "owner/tenant/applicant", and "Business Owner." *Ciolli Aff.* ¶*13-19, Exs. E through J.* Plaintiff conceded in his deposition testimony that he executed documents which caused a special-use permit to be issued by Sea Cliff Village in his own name as the business owner of the Restaurant. *Ex. C Napoli Dep. 103:22-104:20.*

In January 2013, Plaintiff unilaterally terminated the Grimaldi's Sea Cliff Lease and entered into a lease for the premises naming him as tenant and sole proprietor. *Ex. C Napoli Dep. 19:2-19; and Ciolli Aff. ¶20, Ex. K.* Plaintiff also applied and obtained a liquor license in his name by stating under oath that he was the sole "principal" and sole "proprietor" of the Restaurant. *Ciolli Aff. ¶21, Ex L.* Plaintiff held himself out to the public as the owner of the Restaurant. *Ciolli Aff. ¶24, Ex. M.*

Plaintiff hired and trained all employees, set up the operating system, ordered food and supplies and commenced operations without Grimaldi's Sea Cliff's involvement. *Ciolli Aff. ¶¶29, 30.*

Since its opening, Plaintiff has been solely responsible for each and every facet of the operation of the Restaurant. *Ex. C Napoli Dep. 22:2-7 and 33:6-22.* Plaintiff entirely excluded Grimaldi's Sea Cliff from the Restaurant and cannot now argue that it was his employer.

Plaintiff alleges that Defendants "delayed and frustrated" the Restaurant's ability to obtain a liquor license from the New York State Liquor Authority (the "NYSLA"), which resulted in a "meaningful decrease" in the Restaurant's revenues. *Ex. A Complaint ¶¶47-49.* The public records of the NYSLA as well as Plaintiff's deposition testimony, however, contradict such claims. *Ciolli Aff. ¶21; Ex. L; Ex. C Napoli Dep. 96:8-22, 98:22-25 and 101:16-102:15.* Plaintiff's own application (under oath) with the NYSLA named himself as the "principal" and requested that a liquor license be issued in his name as the sole "proprietor" of the Restaurant.

c. Defendant Ciolli is Not Plaintiff's Employer.

Plaintiff cannot raise a triable issue of fact that Defendant Ciolli was his employer for FLSA purposes because, as discussed *supra*, Plaintiff was the tenant of the premises, Plaintiff applied for the permits, approval and liquor license in his own name, and excluded Defendant Ciolli from the operation.

Furthermore, Plaintiff and Defendant Ciolli agreed to a joint venture for the purpose of owning and operating the Restaurant. *Ciolli Aff. ¶10.* Plaintiff breached that agreement and commandeered the Restaurant, to the exclusion of Defendant Ciolli, and cannot now argue that he was an employee. *Ciolli Aff. ¶¶20-23*. In no way can Plaintiff now claim that Mr. Ciolli was his employer for FLSA purposes.

A joint venture is formed under New York law when "(a) two or more persons enter into an agreement to carry on a venture for profit; (b) the agreement evinces their intent to be joint venturers; (c) each contributes property, financing, skill, knowledge, or effort; (d) each has some degree of control over the venture; and (e) provision is made for the sharing of both profits and losses." *SCS Communs., Inc. v. Herrick Co.*, 360 F.3d 329, 341 (2d Cir. 2004).

Regarding the requisite control that a joint venturer must possess, courts have held that "it is not required that each joint venturer actually exercise the same degree of management control… The inquiry as to the existence of this factor is limited to whether a member of the venture had *any* measure of control." *Richbell Info. Servs. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 299 (1st Dept. 2003) (emphasis in original).

In New York, "even where there is no express joint venture agreement, a joint venture may exist 'based upon the *implied* agreement evidenced by the parties' conduct'." *Sea Shipping Inc. v. Half Moon Shipping, LLC*, 848 F. Supp. 2d 448, 458 (S.D.N.Y. 2012) (emphasis in original). This is due, in part, to the fact that an agreement to enter into a joint venture is generally not subject to the statute of frauds. See *Javaid v. Nasir*, 2012 U.S. Dist. LEXIS 56762, *4-5 (E.D.N.Y. Mar. 19, 2012); see also, *Foster v. Kovner*, 44 A.D.3d 23, 27 (1st Dept. 2007).

Plaintiff and Defendant Ciolli jointly agreed and intended to undertake the opening and operation of the Restaurant, a for-profit enterprise. *Ciolli Aff.* ¶¶*10-12.* Plaintiff admittedly contributed financially to the joint venture, claiming to have contributed a substantial portion of the funds required to open the Restaurant (*Ex. A Complaint* ¶*42*; *Ex. C Napoli Dep. 61:16-23, and Ex. N*), and contributed his skill and effort to the venture, in readying the Restaurant for opening and operating. *Ex. A Complaint* ¶¶*31-33*; *Ex. C Napoli Dep. 78:25-79:6*. Plaintiff also admitted in his deposition testimony that Defendant Ciolli contributed approximately $200,000 to the venture in rent payments and otherwise. *Ex. C Napoli Dep. 43:3-12*, *61:24-62:13*.

These contributions to the venture by the parties unquestionably evidence their joint venture. Moreover, the parties' agreement to share in the profits and losses of the Restaurant solidified their arrangement as a joint venture:

> Q: Didn't he [Defendant Ciolli] state that you would receive 50 percent of the profits?
> A: Yes. *Ex. C Napoli Dep. 78:17-19.*

Exhibit N is an accounting for funds contributed by Plaintiff to fund the initial operating losses of the Restaurant and is proof that he in fact shared losses.

3. The Economic Reality Test is Not Applicable.

In *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987), the Tenth Circuit found the economic reality test to be insufficient to assess an employment relationship in a partnership.[1]

[1] "The legal consequences of a joint venture are almost identical to those of a partnership. *Margate Indus., Inc. v. Samincorp, Inc.*, 582 F. Supp. 611, 620 (S.D.N.Y. 1984), and a

There, a dismissed partner of an accounting firm brought suit under various federal laws, including the FLSA. The Tenth Circuit reversed the denial of defendant's motion to dismiss (later re-characterized as a motion for summary judgment), finding that the plaintiff-partner was not an "employee" entitled to bring suit under the FLSA. Regarding the economic reality test, the Tenth Circuit determined that:

> "[t]he first difficulty with the many economic reality factors proffered to us is that they largely arise from cases involving alleged independent contractors. The line-drawing exercise in those cases was between those who were really part of a business (employees) and those who were running a separate business (independent contractors). Factors employed for that purpose are useless for drawing lines between people who are part of the same enterprise." *Wheeler*, 825 F.2d at 271-272 (footnote omitted).

Instead, the court concluded that attributes of a partnership such as exposure to risk, managerial control, the ability to share in profits and the potential for investment, *Id*. at 274, 276, "introduce complexities and economic realities which are not consonant with employee status." The Tenth Circuit ultimately noted that "[t]he word 'employee,' however broadly defined, is still 'employee,' and circumscribed by meanings reasonably related to that word." *Id*. at 276.

In *Godoy v. Restaurant Opportunity Center of N.Y., Inc.*, 615 F. Supp. 2d 186 (S.D.N.Y. 2009), which followed *Wheeler*, restaurant workers brought suit against a not-for-profit corporation, as well as the individual officers of the corporation, alleging a failure to make good on promises that workers' unpaid hours of service in preparation for opening a cooperatively-owned restaurant would receive equity in such restaurant and continuing employment thereafter.

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joint venture under New York law is governed by rules substantially the same as the rules applicable to partnerships. See *Ebker v. Tan Jay Int'l, Ltd.*, 741 F. Supp. 448, 468 (S.D.N.Y. 1990); *Gramercy Equities Corp. v. Dumont*, 72 N.Y.2d 560, 565 (1988) (a joint venture 'is in a sense a partnership for limited purposes, and it has long been recognized that the legal consequences of a joint venture are equivalent to those of a partnership.')." *E-Global Alliances, LLC v. Anderson*, 2011 U.S. Dist. LEXIS 156044, *6 n.4 (S.D.N.Y. May 11, 2011).

The defendants moved to dismiss the federal claims brought under the FLSA, and in granting such motion, the court held that the plaintiffs more resembled partners in a firm, rather than "employees" under the FLSA. Using the factors outlined in *Wheeler*, the court found that although the plaintiffs were not partners or shareholders, the arrangement equated to a partnership more so than an employer-employee relationship. The court also relied, in part, on the fact that the restaurant's liquor license application described plaintiffs as co-owners. *Id.* at 195. In dismissing the plaintiffs' claims, the court stated:

> "Like partners at a firm, Plaintiffs, as putative co-owners of the business they were working to create, 'assume[d] the risks of loss and liabilities' of the venture and had a real opportunity to share in its profits upon success. Plaintiffs' hours of "sweat equity" represented their "capital" contribution to the business." *Id.*

Godoy found that plaintiffs had the right to share in management despite the fact that they would have no share in management of the operations. It was sufficient that plaintiffs were members of a committee tasked with the planning and development stage of the restaurant.

Wheeler and *Godoy* are clearly analogous to the instant case and the factors outlined in *Wheeler* should be applied. Within the purview of *Wheeler,* Mr. Ciolli cannot be considered Plaintiff's employer for FLSA purposes. Plaintiff as a sole proprietor, or Plaintiff and Defendant Ciolli, as members of a joint venture, do not meet the requisite qualifications for employer status over one another, thus barring Plaintiff's claims. This holds particularly true given Plaintiff's eventual unilateral exclusion of Mr. Ciolli from the joint venture. Plaintiff applied for multiple permits from local government authorities naming himself as the tenant or sole proprietor. *Ciolli Aff. ¶¶13-19*; *Exs. E through J. Ex. C Napoli Dep. 103:2-7 and 103:22-104:20.* Plaintiff unilaterally terminated the lease entered into by Grimaldi's Sea Cliff and entered into a lease naming himself as the tenant. *Ciolli Aff. ¶20*; *Ex. K.* Plaintiff unilaterally applied for a liquor license form the NYSLA stating under oath that he was the sole "principal" and sole "proprietor" of the Restaurant and causing the liquor license to be issued to Plaintiff. *Ciolli Aff.* ¶*21*; *Ex. L.*

In consideration of the *Wheeler* factors, it is undisputed that Plaintiff had a real opportunity to share in the profits of the joint venture and the Restaurant. See, *p. 14 Supra*.

Additionally, Plaintiff's concession that he invested over $150,000 into the joint venture and the Restaurant (*Ex. A Complaint* ¶*45*; *Ex. C Napoli Dep. 61:16-23*), undeniably evidences the status Plaintiff possessed. Plaintiff's accounting (*Ciolli Aff.* ¶*25*; *Ex. N*) claims that Defendants, by comparison invested only $8,798.46. Moreover, Plaintiff revealed in his deposition testimony that Mr. Ciolli never even requested that Plaintiff invest these sums. *Ex. C Napoli Dep. 27:21-24*. Plaintiff also claims that he worked for almost a year with no compensation. In *Godoy*, "sweat equity" alone was sufficient to satisfy the investment element.

As was the case in *Godoy*, Plaintiff, as sole proprietor or at least co-owner of the business he was working to create, assumed the risks of losses and liabilities. Although there are no allegations of personal liability for the losses of the Restaurant, it is sufficient that Plaintiff claims that he funded operating losses through March 2013. *Ciolli Aff.* ¶*25*; *Ex. N*.

Plaintiff admits in the Complaint as well as in his deposition testimony that he had the right to share in management, by describing his responsibilities as "keeping books and records, opening and closing the restaurant, ordering food and supplies and supervising the employees." *Ex. A Complaint* ¶*33*; *Ex. C Napoli Dep. 22:2-7 and 33:6-22*. Plaintiff fails to allege any facts that even suggest that any person other than Plaintiff was responsible or took any role in the management of the business.

In addition, as was the case in *Godoy*, Plaintiff otherwise held himself out as the owner and proprietor of the Restaurant. *Ciolli Aff.* ¶*24*; *Ex. M*.

Plaintiff cannot raise a triable issue of fact that he was an employee. Mr. Ciolli was not Plaintiff's employer for FLSA purposes. However, even if, *arguendo*, the economic reality factors employed in *Irizarry* were applied, see *supra*, Mr. Ciolli would still not qualify as Plaintiff's employer under the FLSA.

Mr. Ciolli did not possess the authority to hire or fire Plaintiff or any other employee at the Restaurant. *Ciolli Aff. ¶¶31, 32*. In fact, Plaintiff was the sole person charged with this duty (*Ex. C Napoli Dep. 22:2-7 and 33:6-22*), and demonstrated his control over the Restaurant when he unilaterally fired the Restaurant's accountant. *Ex. C Napoli Dep. 37:5-15 and 38:19-21*.

Mr. Ciolli lacked the authority to supervise and/or control work schedules or conditions of employment of Plaintiff and other employees of the Restaurant. *Ciolli Aff. ¶¶31, 32*. Contrary to the allegations of the Complaint (see *Ex. A Complaint ¶12*), Mr. Ciolli could not have controlled the day-to-day management and operation of the Restaurant or its employees, as he was hardly even there. Plaintiff's deposition testimony reveals that Mr. Ciolli visited the Restaurant less than once a month. *Ex. C Napoli Dep. 34:10-20*.

Mr. Ciolli additionally lacked the authority to determine the rate or method of payment for Plaintiff and other employees of the Restaurant. *Ciolli Aff. ¶¶31, 32*. Plaintiff testified in his deposition that he was the sole authorized signatory on the Restaurant's one bank account, from which all employee earnings were paid. *Ex. C Napoli Dep. 42:14-43:2*. Plaintiff further testified that, despite being in charge of the Restaurant's payroll, he decided not to pay himself:

> Q: You called in the weekly payroll, did you not?
> A: Yes.
> . . . .
> Q: But you chose not to call in your payroll?
> A: Didn't think it was right to call in money we didn't have.
> Q: But you called in all the other employees' payroll?
> A: Correct. I made sure the employees got paid.
> Q: Was your feeling that the company couldn't afford to pay you?

A: We weren't doing enough to make payroll sometimes.
Q: Did you ultimately make all payroll that was owed to other employees?
A: All employees were paid. *Ex. C Napoli Dep. 30:25-32:6.*

Q: Frank never told you not to reimburse yourself for any money advance, did he?
A: No.
Q: But you determined that it wasn't right to reimburse yourself when the company was having cash-flow problems; is that a fair statement?
A: Correct. Because it is absolutely wrong. When you have employees, your first duty as a manager in any business is to make sure your employees are paid first. *Ex. C Napoli Dep. 56:22-57:8.*

Similarly, Mr. Ciolli did not keep records of Plaintiff's or any other Restaurant employee's employment, as Plaintiff kept those records *Ex. C Napoli Dep. 35:25-36:4.* Plaintiff unilaterally fired the Restaurant's accountant to main control of the books and records and refused to provide access to the books and records. *Ciolli Aff. ¶¶26, 28, 31-34*; *Ex. C Napoli Dep. 38:22-39:11*.

Therefore, under either the *Wheeler* standard or the *Irizarry* standard, there is no material issue of fact that Defendant Ciolli was Plaintiff's employer for the purposes of the FLSA, and thus, summary judgment should be granted on Plaintiff's claims.

4. Defendants Are Not Plaintiff's Employers Under the New York Labor Law.

In the Complaint, Plaintiff largely reiterates his FLSA claims as supplemental state law claims under the New York Labor Law (the "NYLL"). The NYLL defines "employer" to include "any person… employing any individual in any occupation, industry, trade, business or service" or "any individual… acting as employer." *NYLL §190(3)*; *NYLL §651(6)*. As with the FLSA, these definitions prove to be entirely ineffective in determining the existence of an employment relationship.

The Second Circuit, in *Irizarry*, noted that the question of whether "the tests for 'employer' status are the same under the FLSA and the NYLL… has not been answered by the New York Court of Appeals." *Irizarry*, 722 F.3d at 117. District Courts in this Circuit, however, "have interpreted the definition of 'employer' under the New York Labor Law coextensively with the definition used by the FLSA." *Sethi v. Narod*, 974 F. Supp. 2d 162, 188-189 (E.D.N.Y. 2013; see also, *Chen v. St. Beat Sportswear, Inc.*, 364 F. Supp. 2d 269, 278 (E.D.N.Y. 2005) ("Courts hold that the New York Labor Law embodies the same standards for joint employment as the FLSA." (citation omitted)); *Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901, 940 (S.D.N.Y. 2013) (noting that "[c]ourts in this District have regularly applied the same tests to determine, under the FLSA and the NYLL, whether entities were joint employers" because "[t]he statutory standard for employer status under the NYLL is nearly identical to that of the FLSA" and that although "the New York Court of Appeals has not yet resolved whether the NYLL's standard for employer status is coextensive with the FLSA's," "there is no case law to the contrary" (citations omitted)).

Based on the foregoing, and for the same reasons as under the FLSA, Plaintiff cannot raise a triable issue of fact that Defendants were Plaintiff's employers for purposes of the NYLL. When looking at the parties' relationship as a whole, Defendants lacked the authority to hire or fire Plaintiff, to supervise or control Plaintiff's work schedule or conditions of his employment, to determine Plaintiff's payment, and Defendants kept no record of Plaintiff's employment. Moreover, Plaintiff had a real opportunity to share in the profits of the enterprise, contributed capital to the enterprise, assumed the risks of losses and liabilities, and had a right to share in management.

Alternatively, should summary judgment be granted on Plaintiff's FLSA claims, it is respectfully requested that this Court decline to exercise supplemental jurisdiction over

Plaintiff's state law claims under *28 U.S.C. § 1367*.

C. There is no Evidence of Retaliation.

Plaintiff's allegations of retaliation by Defendants based upon Plaintiff's filing of this action are wholly unsubstantiated and conclusory in nature. Plaintiff asserts retaliation claims under both the FLSA and the NYLL based upon statements allegedly made by Mr. Ciolli to employees and patrons of the Restaurant, as well as Plaintiff's belief that Mr. Ciolli fired Plaintiff from the Restaurant. *Ex. A Complaint* ¶¶*76-83*. Plaintiff, however, offers no evidentiary proof in admissible form which supports either of these claims, and as such, summary judgment is warranted as to both causes of action.

1. Retaliation Under the FLSA and NYLL.

Under the FLSA, it is unlawful for an employer "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding…" *29 U.S.C. § 215(a)(3).*

In *Johnson v. Ultravolt, Inc.*, 2015 U.S. Dist. LEXIS 16013 (E.D.N.Y. Feb. 10, 2015), the court summarized the relevant standard to be applied to FLSA retaliation claims:

> "To establish a prima facie case of FLSA retaliation, a plaintiff must show: (1) participation in protected activity known to defendant, like the filing of a FLSA lawsuit; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action… If the plaintiff is able to do so, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the… action." *Johnson*, 2015 U.S. Dist. LEXIS 16013, at *8-9 (internal quotation marks and citations omitted); see also, *Crawford v. Coram Fire Dist.*, 2015 U.S. Dist. LEXIS 57997, *18-19 (E.D.N.Y. May 4, 2015).

Likewise, "[t]he retaliation provision of the New York Labor Law is closely analogous and is analyzed under the same burden-shifting analysis [as under the FLSA].” *Crawford,* 2015 U.S. Dist. LEXIS 57997, at *19 (citation omitted).

2. Defendants Did Not Retaliate Against Plaintiff.

Plaintiff alleges that Mr. Ciolli encouraged employees of the Restaurant to quit, told customers not to frequent the Restaurant, and visited the Restaurant intending to harass and intimidate Plaintiff. *Ex. A Complaint ¶¶76-83*. Nowhere is it alleged that 1 Front Street or Grimaldi’s Sea Cliff were in any way involved in the alleged retaliatory actions. Furthermore, Plaintiff has failed to offer any evidentiary proof in admissible form that Mr. Ciolli retaliated in the manner alleged.

Plaintiff has offered no proof that Mr. Ciolli told customers not to frequent the Restaurant and Plaintiff has offered no proof of Mr. Ciolli’s alleged harassment or intimidation. During his deposition testimony, Plaintiff even conceded that he has never heard Mr. Ciolli tell one of Plaintiff’s employees to quit:

> Q: Did you ever hear Frank Ciolli tell employees to quit their position with Sea Cliff Grimaldi’s?
> A: Yes.
> Q: When did this occur?
> A: Right around -- I’m going to say around March. Could be off. Came in the restaurant with four guys including Mike Feldman, threatened my wife, threatened my employees and shouted out in the restaurant in a very loud and boisterous manner that I am the owner of Grimaldi’s, that I’m no good, I’m a piece of crap and that he’ll teach all the employees here a lesson.
> . . . .
> Q: You testified that he was with four guys including Mike Feldman?
> A: Yes.
> Q: Who were the three other guys?
> A: I don’t know. I was not there. My wife was there.
> Q: Okay. So, when I asked you at the beginning of this if you ever heard Frank, you didn’t hear this conversation then?
> A: I’m sorry. Then I misspoke. Right, I did not hear. My wife heard. Sorry.
> Q: This is something your wife told you?

A: Correct.
Q: So, you never heard Frank say these things?
A: Correct, I never heard. I apologize. *Ex. C Napoli Dep. 50:5-51:15.*

Specifically, Mr. Ciolli has not told any employee of the Restaurant to quit, he has not encouraged any patron not to frequent the Restaurant and he has not harassed or intentionally intimidated Plaintiff. *Ciolli Aff. ¶35.*

Additionally, Plaintiff has offered no evidentiary proof that Mr. Ciolli fired Plaintiff. Plaintiff alleges that Mr. Ciolli fired him by changing the locks to the Restaurant. Mr. Ciolli, as discussed herein, was not Plaintiff's employer and therefore lacked the authority to fire Plaintiff. Moreover, Mr. Ciolli did not change the locks of the Restaurant. *Ciolli Aff. ¶36.* Plaintiff, tellingly, fails to address the fact that the Restaurant's lease was in default and there was an ongoing eviction proceeding regarding the premises at the time the locks were allegedly changed. *Id.* Furthermore, Plaintiff testified that Defendant Ciolli never actually told him that he was fired:

Q: Hadn't the landlord of 349 Glen Cove [sic] initiated an eviction proceeding?
A: Yes.
Q: The eviction proceeding because the restaurant couldn't afford its rent, couldn't pay its rent?
A: My understanding, yes.
Q: Did Frank [Ciolli] ever tell you that you were fired?
A: No.
Q: Is it your testimony that you learned that you were fired when the locks were changed?
A: Yes. *Ex. C Napoli Dep. 60:19-61:7.*

Plaintiff's assumptions regarding the status of his employment coupled with unsubstantiated allegations of Mr. Ciolli's supposed conduct cannot carry the weight of Plaintiff's retaliation claims against all Defendants, and makes no causal link between the alleged conduct and the alleged discriminatory action against Plaintiff. Summary judgment should therefore be granted on these claims as to all Defendants.

D. Plaintiff Possesses No Claim Against Defendants Under Quantum Meruit.

In order to recover under a theory of quantum meruit, "New York law requires a claimant to establish (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services."[2] *Mid-Hudson Catskill Rural Migrant Ministry, Inc.*, 418 F.3d at 175.

Plaintiff cannot argue that it may be reasonably inferred that Defendants accepted his services, as Defendants were not Plaintiff's employers and were in no position to accept such services. Plaintiff then cannot argue that he was justified in reasonably expecting compensation from Defendants for those services as, again, Defendants were not Plaintiff's employers.

Because there can be no triable issue of fact as to whether Defendants were in a position to accept Plaintiff's services, Defendants is entitled to summary judgment on Plaintiff's quantum meruit and unjust enrichment claims.

E. Defendants Did Not Breach Fiduciary Duties Owed to Plaintiff.

Under New York law, the requisite elements of a claim for breach of fiduciary duty are: "(1) that a fiduciary duty existed between plaintiff and defendant, (2) that defendant breached

[2] "Applying New York law, we may analyze quantum meruit and unjust enrichment together as a single quasi contract claim. See, *Newman & Schwartz v. Asplundh Tree Expert Co., Inc.*, 102 F.3d 660, 663 (2d Cir. 1996) (explaining that 'quantum meruit and unjust enrichment are not separate causes of action,' and that 'unjust enrichment is a required element for an implied-in-law, or quasi-contract, and quantum meruit, meaning 'as much as he deserves,' is one measure of liability for the breach of such a contract'), *rev'd on other grounds*, 959 F.2d 425 (2d Cir. 1992))." *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 175 (2d Cir. 2005).

that duty, and (3) damages as a result of the breach." *E-Global Alliances, LLC*, 2011 U.S. Dist. LEXIS 156044 at *25.

It is well established that joint venturers owe each other fiduciary duties. *Id*. See, e.g., *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 972-973 (2d Cir. 1989) (discussing fiduciary duties of partners under New York law); see also, Footnote 1, *supra*.

"Although there is no set formulation of the fiduciary duties of partners, it is beyond cavil that a partner's diversion of partnership funds for personal use, if proved constitutes a breach of that partner's fiduciary duty. A general partner is also liable for losses caused by fraud, culpable negligence, willful disregard of duty or bad faith." *E-Global Alliance, LLC*, 2011 U.S. Dist. LEXIS 156044 at *25-26 (internal quotation marks and citation omitted).

There is no allegation that Defendants have diverted venture funds for personal use, committed fraud or acted negligently, willfully disregarded the duties owed to Plaintiff, acted in bad faith, or acted in any similar way that would amount to a breach of the fiduciary duties owed to Plaintiff. *Ciolli Aff*. ¶*37*. Plaintiff has offered no proof of such culpable conduct and, accordingly, summary judgment is warranted on this cause of action as against all Defendants.

CONCLUSION

For the above stated reasons, it is respectfully submitted that summary judgment should be granted dismissing the Complaint against all Defendants.

Dated: October 29, 2015

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